Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of Application by Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan	))))))))	CC Docket No. 97-137

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OPPOSITION OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES TO PETITIONS FOR RECONSIDERATION

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SUMMARY

BellSouth, US WEST and the New York Department of Public Services have each filed petitions for reconsideration of the Ameritech-Michigan 271 Order. These petitions should be denied for the following reasons:

- US WEST and NYDPS try to defend their failure to participate in this proceeding on the ground the Commission failed to provide notice of rulemaking. But this is an ajudicative proceeding, which has predential consequences that do not require rulemaking notice in order to take effect.

- NYDPS contends the Eighth Circuit's decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) prevents this Commission from reviewing any anti-competitive aspects of interconnection pricing pursuant to § 271. These claims have been raised at the Eighth Circuit, and are unfounded because: (1) the Eighth Circuit's decision did not reach the Commission's § 271 power; and (2) the logic of the Eighth Circuit's decision, even had it been applied to § 271, would uphold the Commission's power in this context.

- Contrary to BellSouth and US WEST's claims, the "public interest" determination under § 271(d)(3)(C) as interpreted in the Ameritech-Michigan 271 Order is perfectly consistent with § 271(d)(4)'s requirement prohibiting expansion of the competitive checklist.

- With an eye on its own pending § 271 application for South Carolina (in which it announced its intention of not complying with the Ameritech-Michigan 271 Order), BellSouth unveils a startling new theory of OSS compliance. First, it claims OSS compliance cannot be assessed using end-to-end performance data. Second, BellSouth claims the right to force CLECs to use existing RBOC OSS systems that are different from the OSS systems used to support competing RBOC retail services. Third, having forced CLECs to use antiquated or inappropriate OSS systems (rather than permit mediated access to legacy OSS systems, or creating adequate new systems), BellSouth insists the legal standard for CLEC-OSS compliance should be determined by the level of service provided to the original intended customers of those systems -- and not by the service level provided by the RBOC OSS systems serving the customers of the RBOC services which compete with the CLEC services!

In short, the more success BellSouth enjoys in saddling CLECs with old and inadequate OSS systems (which they often must accept to avoid additional delay), the easier its burden of OSS compliance becomes under its new theory. Stated differently, BellSouth's argument is tantamount to a restaurant contending it cannot be held liable for food poisoning so long as every customer eating a tainted dish winds up sick.

- US WEST complains the Commission should have resolved more issues in the Ameritech-Michigan 271 Order, but Ameritech recently testified to the Senate that the Commission had provided an adequate "roadmap," and has declined to appeal the decision.

Accordingly, the petitions should be denied.

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OPPOSITION OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES TO PETITIONS FOR RECONSIDERATION

Pursuant to Commission Rule 1.106(g) and the Public Notice published September 25, 1997, the Association for Local Telecommunications Services ("ALTS") hereby opposes the petitions filed by BellSouth, US WEST, and the New York Department of Public Services for reconsideration of the Commission's Memorandum Opinion and Order released August 19, 1997, in this docket ("Ameritech-Michigan 271 Order").

ARGUMENT

I. NEITHER US WEST NOR THE NEW YORK DPS HAVE SHOWN GOOD REASON WHY IT WAS NOT POSSIBLE FOR THEM TO HAVE PARTICIPATED IN THIS PROCEEDING.

Commission Rule 1.606(b)(1) requires any petitioner for reconsideration which did not participate in the proceeding leading to the challenged order to first show: "good reason why it was not possible for him to participate in the earlier stages of the proceeding." Neither US WEST nor the New York Department of Public Services ("NYDPS") participated in this proceeding.

NYDPS states that it did not participate because: "the Commission did not provide notice that the standards established in the Ameritech proceeding would directly apply to Bell Atlantic's application for interLATA entry in New York" (NYDPS Petition at 2). Similarly, US WEST asserts that: "The Commission did not provide public notice ... in accordance with the Administrative Procedure Act and sections 1.412 and 1.415 of its own rules" (US WEST Petition at 4).

Both US WEST and NYDPS confuse the Commission's rulemaking powers, and the associated notice requirements of the Administrative Procedure Act reflected in Commission Rule 1.412, with the ordinary precedential effect of adjudicative decisions. Like many other adjudicative forums, the Commission has broad discretion to dispose of cases on broad grounds or narrow, as it sees fit.[1] Both US WEST and NYDPS were aware the principle of stare decisis would make the Commission's determinations applicable to future cases.

The case relied upon by NYDPS to support its claim, NLRB v. Wyman-Gordon Co., 394 U.S. 762 (1969), demonstrates the Commission was fully entitled to act as it did. In Wyman-Gordon

[1] SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)(" ... the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency").

the Court found the NLRB had violated the rulemaking requirements of the Administrative Procedure Act by failing to apply a new precedent to the participants in the proceeding in which the new ruling was issued (id. at 763). The Court then went on to reaffirm that adjudicatory proceedings can result in binding precedent (id. at 765-66):

> "Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein .... They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of stare decisis in the administrative process, they may serve as precedents."

Beyond the absence of any legal requirement for advance notice, it is manifest both US WEST and NYDPS were aware that § 271 decisions could well involve the issues they now seek to challenge on reconsideration. US WEST's brief dated November 18, 1996, in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), a proceeding in which NYDPS also participated, states (at 31): " ... the FCC has threatened to impose its pricing rules through the back door in adjudicating complaints under § 208, and in making its 'public interest' determinations when Bell companies seek long-distance authority under section 271."

Because US WEST and NYDPS were not entitled to rulemaking notice of the issues that might be raised in the Ameritech-Michigan 271 Order, and because they were aware these issues might well be addressed, they have plainly failed to show good reason for their failure to participate in the proceeding.

Accordingly, their petitions for reconsideration should be dismissed.

II. THE EIGHTH CIRCUIT HAS NOT ADDRESSED THE COMMISSION'S AUTHORITY TO REVIEW INTERCONNECTION PRICES UNDER § 271.

NYDPS asserts that: "If the Commission does not have jurisdiction under 252(d) to impose national pricing standards under the Eighth Circuit ruling, then it does not have that jurisdiction under § 271, which expressly incorporates the Section 252(d)(1) rates in the competitive checklist" (NPDPS Petition at 3). Contrary to NYDPS' claim, the Opinion of July 18, 1997, decided two, and only two, jurisdictional issues.[2]

First, the Eighth Circuit held the Commission lacks jurisdiction to adopt pricing regulations that override the provisions of § 2(b) and bind state utility commissions when they arbitrate interconnection agreements under § 252 of the Act. The Eighth Circuit relied on the facts that § 252(c)(2) directs the states to set prices in arbitrations "according to § 252(d)," and that § 252(d), in turn, lists the "requirements" that govern the setting of rates, but makes no mention of Commission regulations. 120 F.3d at 794-95. Further, while the Commission and intervenors had claimed that §§ 4(i), 201(b), 251(d), and 303(r) authorized the regulations that preemptively defined these "requirements," the Eighth Circuit held that "none of the[se]

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[2] This portion of ALTS' opposition reflects the reply of ALTS and other parties to similar claims presented to the Eighth Circuit (see opposition filed October 1, 1997).

provisions" unambiguously granted the Commission authority to dictate the prices for what were held to be exclusively intrastate services. Id.

Second, the Court held that § 208 of the Act does not give the Commission the authority to review interconnection agreements and then to order that they be modified on the basis of the Commission's interpretation of the pricing requirements of § 251(c) or § 252(d). The Eighth Circuit noted that § 252(e)(6) expressly grants this jurisdiction to federal district courts, and the Court concluded that this federal court authority is exclusive. 120 F.3d at 803.

By contrast, no issue involving the Commission's authority under § 271 was raised by any Eighth Circuit petitioner. To the contrary, the only mention of § 271 was to assert that the Commission would do precisely what it has now done if the Court were to hold (as it has) that the Commission lacked jurisdiction to impose pricing regulations on the states without addressing the merits of the Commission's interpretations of the pricing requirements of § 251(c) and § 252(d). In particular, the BOCs contended that the Commission would then apply this interpretation of the Act's pricing requirements both in determining a BOC's "compliance" with the "checklist" (Large LEC Reply Brief at 32) and in determining whether BOC's long distance entry would be in the "public interest" (Large LEC Br. at 31).

NYDPS insists that: "On its face, the checklist requirement of section 271(c)(2)(B)(1) requires the Commission to verify whether a BOC is providing interconnection in accordance with the pricing standards developed by state Commissions. It does not, as decided in Ameritech, give the Commission the authority to block RBOC entry because a state commission fails to adopt TELRIC pricing" (NYDPS Petition at 4). This claim is both erroneous and irrelevant.

First, the contention is simply wrong. The Commission's Local Competition Order asserted the authority both to adopt binding rules that prescribe the methodologies under which states set rates and to enter orders under § 208 that direct changes to state-arbitrated rates. By contrast, a Commission decision that rejects a long distance application on the ground that a BOC's prices do not satisfy the requirements of § 251(c) or § 252(d) would have no effect on the BOC's ability to continue to charge those prices or on the state's ratemaking standards or determinations. It simply means that the BOC will not be authorized to provide long distance services, which is a decision that §§ 271 expressly empowers the Commission to make. Further, the BOC (or the state) is free to appeal the Commission's determinations under § 271 to the D.C. Circuit. So contrary to NYDPS's claim, it is not the case that the Ameritech-Michigan 271 Order allows the Commission to dictate the pricing principles that must be followed for a BOC to obtain long distance authority. Long distance authority will be denied on this ground only if the D.C. Circuit agrees with the Commission's conclusions that the BOC's pricing practices violate the requirements of § 251(c) and § 252(d).

Second, NYDPS' argument would be unfounded even if the practical effect of § 271 decisions by the Commission and the D.C. Circuit were to cause the BOCs and states to elect to change some prices. It would not raise any issue under § 2(b), for the price changes (1) would be the result of the state's independent decision, not a federal decree (compare South Dakota v. Dole, 483 U.S. 203 (1987)), and (2) would, in all events, only be an indirect consequence of the Commission's exercise of explicit jurisdiction to assure that the provision of interstate services satisfies federal standards and is consistent with the public interest. Compare PSC of Maryland v. FCC, 909 F.2d 1510 (D.C. Cir. 1990). Further, the Eighth Circuit's Opinion acknowledged that Congress could give the Commission authority over pricing if it did so unambiguously (120 F.3d at 797), and § 271 unambiguously directs the Commission to deny long distance authority if a BOC is not providing access and interconnection in accordance with the federal pricing requirements. In all events, the question of whether or how § 2(b) applies to the provisions of § 271 was not remotely addressed in the Eighth Circuit's Opinion, which applied § 2(b)'s rule of construction only to the different terms of other provisions of the Act that were held to apply only to intrastate services.

Because the Eighth Circuit's Opinion did not decide any

§ 271 issues, the Ameritech-Michigan 271 Order is not inconsistent with that opinion in any way.

III. THE COMMISSION HAS BROAD DISCRETION TO CONSIDER VARIOUS FACTORS UNDER THE PUBLIC INTEREST DETERMINATION PROVIDED FOR IN §271(d)(3)(C).

Both BellSouth and US WEST argue that the prohibition on expansion of the competitive checklist (contained in § 271(d)(4)) effectively precludes the Commission from considering under the public interest standard of § 271(d)(3)(C) the various factors enumerated in its Ameritech-Michigan 271 Order, particularly any aspects of local competition. See, e.g., US WEST's Petition at 17: "Indeed, the one category of issues that the Commission clearly cannot consider in exercising its responsibility to assess whether a grant of § 271 application is in the public interest is local competition. § 271(d)(4) plainly removes that category in its entirety --which is the subject of the competitive checklist -- from the ambit of permissible consideration under the public standard."

Neither BellSouth nor US WEST point to any specific statutory language that prevents application of the § 271(d)(3)(C) public interest standard to local competition matters. Indeed, one of the sponsors of the Telecommunications Act pointed to the local competition requirements in the Act in successfully defending the bill against an amendment that would have removed the public interest test entirely (141 Cong. Rec.

S7961-62; Remarks of Sen. Stevens in response to Sen. McCain's proposed amendment deleting the public interest test):

> "In my judgment, this compromise we have worked out is just right. The FCC has a long history of considering public interest, convenience, and necessity. That was the bedrock principle of the 1934 Communications Act.
>
> "In order to transition to this new era and take the courts out -- because under the modified final judgment, the courts have been determining communications policy through administrative hearings under court jurisdiction. In order to take them out, <u>the parties involved wanted to be assured that, at least for this transition period, the oversight role of the FCC would be restored</u>. (Emphasis supplied.)
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> *　　*　　*
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> "The checklist contains 14 technical requirements for interconnection and unbundling of the Bells' local exchange networks. However, the list is not self-explanatory or self-implementing. One of the requirements is there must be the capability to exchange telecommunications between customers of the Bell company and an interconnecting carrier.
>
> "<u>Now, I believe the reading of the checklist itself shows where the FCC is going to be involved in discretion in some way</u>. The Senator from Arizona argues that the checklist is all that is needed and it should be straightforward for the FCC to implement. Paragraph 4 of subsection (b) of this bill specifically prohibits the FCC from limiting or expanding the terms of the checklist. (Emphasis supplied.)
>
> "But the trouble is, how will the FCC decide that the capability to exchange communications exists? If we have just the checklist and the FCC decides that the capability to exchange communications efficiently does not yet exist, then it would be off to the courts again, because obviously no person that seeks approval of the FCC is going to take that denial without going to court."

The legislative history of the Act thus clearly reveals that the public interest standard of § 271(d)(3)(C) was intended to confer an "oversight role" on the Commission that included local competition matters.

IV. THE REQUIREMENT OF PERFORMANCE MEASUREMENTS FOR OSS AND TRUNK BLOCKING IS WELL FOUNDED AND ENTIRELY WITHIN THE COMMISSION'S DISCRETION.

BellSouth attacks aspects of the Ameritech-Michigan 271 Order dealing with OSS performance standards (BellSouth Petition at 2-6), while US WEST objects to virtually all aspects of the performance measurements and standards required in the order (US WEST Petition at 11-16).

The core of BellSouth's claim is that: "Although a BOC might choose to demonstrate both nondiscriminatory access to its OSSs and access to the underlying checklist item simultaneously by comparing performance for CLEC orders to performance for the BOC's own retail orders all the way from order to completion, the BOC need not do so to demonstrate the adequacy of its OSSs. As explained above, the speed and accuracy with which a BOC fills a request after it has passed through the OSSs doe not pertain to the requirement of nondiscriminatory access to OSSs." BellSouth Petition at 4.

Contrary to BellSouth's argument, the Commission was well within its discretion to require end-to-end performance measurements in regard to OSS compliance, rather than attempting to end its OSS inquiry at the OSS-UNE interface. Even if BellSouth were correct that the legal standard for UNE provisioning might differ from the legal requirements for OSS -- a contention ALTS does not concede -- BellSouth is free to quantify the effect of any such disparity in standards, and submit that analysis in showing its OSS compliance. Stated differently, if BellSouth believes it is entitled to provision UNEs less efficiently than its comparable retail services, its recourse is to quantify the effects of such a legal difference, and then, in addition to submitting the end-to-end numbers, also submit numbers which back out that difference. Such an approach makes far more sense than refusing to provide end-to-end data in the first place.[3]

BellSouth also makes a remarkable argument concerning the legal standard that should be applied to OSS provisioning. According to BellSouth, any attempt by the Commission to require that BellSouth provision OSSs in a manner that would permit new entrants a meaningful opportunity to compete would require: "the BOC to provide a level of access superior to what the BOC itself receives" (BellSouth Petition at 5, citing to the Eighth Circuit's holding that CLECs are only entitled to access to an incumbent's existing network). BellSouth goes on to assert that where it provides OSSs via systems originally designed for special services, the proper legal standard for such OSS systems should be determined by the level provided to access customers.

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[3] Furthermore, end-to-end measurements are much more practical than measurements limited just to a theoretical "OSS" phase. Take the simple example of a field technician installing a loop. OSS systems generate a field order providing names, addresses, install window times, etc., which the technician continues to use throughout the course of the installation. There is no obvious place at which the OSS function terminates, and the raw provisioning of the UNE takes over, given the continued utilization of OSS-generated work materials.

This is sheer audacity. BellSouth acknowledges it would have to provide comparable OSS performance if it allowed CLECs to use the same OSS it provides to its comparable retail services. But BellSouth refuses to allow CLECs to use either its legacy OSS systems -- claiming potential harms to customer privacy -- nor will it create any mediated access that would cure such "difficulties." Instead, it forces CLECs to use OSS systems designed for entirely different services and customers, and then insists the measure of its legal compliance in providing those systems should solely be determined by the performance achieved for those other customers. Like a restaurant charged with failing to serve healthy food, it is not a defense for BellSouth to claim that other customers have suffered as much as CLECs.

In addition to attacking the OSS performance requirements of the Ameritech-Michigan 271 Order, US WEST challenges the performance requirements for RBOC-CLEC trunk blocking (US WEST Petition at 15-16). According to US WEST: " ... nothing in section 271 suggests that Congress intended the Commission to substitute its views for that [negotiation and arbitration of interconnection agreements] process through the back door of conditioning entry into interLATA services."

But there would be no need for § 271 if, as US WEST suggests, Congress actually intended that the mere existence of an interconnection agreement were a sufficient basis to permit in-region RBOC long distance entry. And the need for § 271 is also evident from § 252(a), which expressly provides that requested interconnection agreements need not comply with the requirements of § 251(c), meaning that state approval is no guarantee of § 251(c) compliance, Thus, § 271(d)(3) expressly requires the Commission to enter specific findings for RBOC applications concerning the various criteria set forth in § 271.

V. THE COMMISSION WAS NOT OBLIGATED TO RESOLVE ALL POTENTIAL ISSUES THAT COULD ARISE IN § 271 APPLICATIONS.

US WEST complains mightily that the Commission should have resolved: " ... all of the issues presented by Ameritech's section 271 application" (US WEST Petition at 5). As a threshold matter there is considerable irony in US WEST's request, given the RBOCs' continued and persistent complaints about undue "micromanagement" under the § 271 process.

Turning to the legal side of US WEST's contention, neither case relied upon by US WEST stands for the proposition that an adjudication must resolve every conceivable dispute on the record. On the contrary, the traditional rule is that a forum is free to reach as many, or as few issues as it deems necessary and appropriate for disposition. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

More basically, US WEST is simply wrong in contending the Ameritech-Michigan 271 Order failed to provide adequate guidance. Ameritech Executive Vice President Barry K. Allen testifed to the Senate Antitrust Committee on September 17, 1997, that: "Last month, in response to Ameritech's most recent long distance filing in Michigan, the FCC provided a detailed road map" (emphasis supplied). Inasmuch as Ameritech believes it has received sufficient guidance, a belief underscored by its decision not to appeal the Ameritech-Michigan 271 Order, US WEST has no basis for arguing that additional guidance should have been provided.

CONCLUSION

For the foregoing reasons, ALTS requests that the petitions for reconsideration filed by BellSouth, US WEST, and the NYDPS be denied.

Respectfully submitted,

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October 9, 1997

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition to Petitions for Reconsideration of the Association for Local Telecommunications Services was served October 9, 1997, on the following persons by first-class mail or hand service, as indicted.

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